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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 44

ROBERT FRAZIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 99–101)[1] is reported at 163 F. 2d 817.

JURISDICTION

The judgment of the Court of Appeals was entered October 6, 1947 (R. 102). On November 5, 1947, Mr. Justice Jackson extended petitioner's time to file a petition for a writ of certiorari to December 5, 1947, and the petition was filed on

[1] The record was printed as a joint appendix to Appellee's Brief in the court below. The page references here are to the pagination of the Appendix, not to the page numbers of the original record, which appear in indentations on the left hand sides of the pages in the Appendix.

that date. The petition was granted April 19, 1948 (R. 103). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (now 28 U. S. C. 1254). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

Whether petitioner's conviction of a narcotic law violation should be set aside because:

1. It is alleged, without any supporting evidence or offer of proof, that those persons summoned for jury duty who indicated they did not care to serve were permitted to stand aside.

2. The jury which heard the case consisted of twelve employees of the United States Government.

3. One juror was the husband of a Treasury Department employee and it is alleged that another juror was employed in the Treasury Department, although neither were challenged by petitioner.

STATEMENT

On June 5, 1944, petitioner was indicted for a violation of the Harrison Narcotic Act[1] (R. 90). On October 9, 1946, the case came on for trial (R. 1). The Assistant United States Attorney identified the defendant, counsel and the witnesses, and asked the prospective jurors whether they knew any of the persons so identified (R. 2).

[1] Section 2553 (a) of the Internal Revenue Code.

One juror stated that she was acquainted with one of the witnesses, and was excused by the court (R. 2–3). The prosecutor then asked:

> Do any of you know why you cannot sit upon this jury and render a fair and impartial verdict purely upon the evidence which is presented, applying to it the law which is given to you by His Honor?

This was answered in the negative. (R. 3.) The same question was asked of, and negatively answered by, each person called to replace a discharged juror (R. 4, 5, 6, 7, 10, 11, 12).

Petitioner's counsel examined the jurors en masse as follows (R. 3):

> Mr. Buckley. How many of the prospective jurors are employed in the Federal Government?
>
> (Jurors indicated by raising hands.)
>
> Mr. Buckley. Would any of you prospective jurors have any prejudice of any kind against any defendant who might be charged with violation of the narcotic law or the Narcotic Act?
>
> (No response.)
>
> * * * * * *
>
> Mr. Buckley. Would any of you jurors give more weight or credence to the testimony of a police officer than you would to any other civilian?
>
> (No response.)
>
> Mr. Buckley. I take it from your silence your answer would be no.

After petitioner's counsel had peremptorily chal-

lenged three jurors (R. 3–4) and one was discharged for cause (R. 5), counsel examined the jurors then in the box as follows (R. 5):

> Mr. BUCKLEY. Do any of you jurors now impaneled have any prejudice against anyone who might be charged with a violation of the narcotic law?
>
> (No response.)
>
> Mr. BUCKLEY. Are any of you jurors related to any member of the Metropolitan Police Department or a narcotic agent?
>
> (No response.)
>
> Mr. BUCKLEY. Are any members of your immediate family employed in the Treasury Department?
>
> Mr. BENJAMIN ROOT [one of the jurors]. My wife is in the Treasury Department.
>
> Mr. BUCKLEY. What branch of the Treasury Department?
>
> Mr. ROOT. Secretary's office.

Mr. Root was not challenged. No other person in the box made any affirmative reply to these questions.

In all, petitioner's counsel challenged seven of the twelve persons originally in the box: William T. Mack (R. 3), Mrs. Marjorie E. Merrick (R. 7), George M. Montgomery (R. 4), Mrs. Catherine N. Moody (R. 8), William O. Parker (R. 4), Walter A. Robinson (R. 5), and Joseph Rode (R. 7). He asked Clarence Vogle, who was not one of the original twelve (R. 1), what his occupation was. Upon learning that Vogle was a "linoleum salesman for asphalt tiling," counsel peremptorily

challenged him (R. 6).[1] James A. Longmore, not among the original twelve in the box (R. 1), was also questioned concerning his occupation. After stating that he was a street car operator, he was peremptorily challenged by petitioner's counsel (R. 11).

After petitioner's counsel had exercised eight peremptory challenges, there were no more prospective jurors immediately available, so court was recessed until the afternoon, when the court expected more jurors to be present (R. 8). On resumption after the recess, petitioner's counsel moved to strike the entire panel, saying (R. 8–9):

> * * * I have made a little investigation of the impaneling or selection of this panel here as well as selection of the other panels sitting this month, and I most respectfully submit that the method and procedure used in selecting is irregular, and I am going to move to strike this whole panel, the reason being this: that from the inquiries I have made, there were about five hundred or five hundred and a few jurors subpenaed—that is, individually subpenaed to appear here—from which they selected a sufficient number of jurors here.
>
> If there were five hundred, they were divided into two groups, two hundred fifty

[1] The record at this point fails to show who challenged Vogle. However, he must have been challenged by petitioner's counsel since the latter used all of his 10 peremptory challenges (R. 12).

> for one court and two hundred fifty for another court, and of the two hundred fifty for each court, they were asked how many of those two hundred fifty did not desire to serve as jurors, to raise their hands, so those who raised their hands were told to step to one side, and out of the remaining number that were left they picked the jurors, and the remaining number that were left consisted mostly of Government employees and housewives, and unemployed. There are only a few unemployed.

This motion was denied with leave to renew it by way of a motion for a new trial in the event of conviction (R. 9).

After petitioner's counsel had exhausted his ten peremptory challenges, he asked the twelve jurors in the box how many were employed by the Government. Each of the twelve indicated he was (R. 12). Thereupon, counsel challenged the jury for cause, saying (R. 12–13):

> In selecting these different panels on the first Tuesday of the month, the Clerk says to the five hundred or two hundred fifty, whichever it may be, individuals who are summoned to appear here, from which to pick the juries, "All those who do not desire to serve, step to one side."
>
> That leaves a batch of Government employees and housewives.
>
> Now, I have exhausted my ten challenges, and here I have twelve Government jurors who are to decide this defendant's case,

> which is a violation of the Federal statute, being brought in a Federal Court, prosecuted by a Federal prosecutor, and the case is presented by Federal agents. I submit there is reason to challenge these people for cause.

The motion was denied, with leave to renew it by motion after verdict (R. 13).

At the close of the testimony, petitioner renewed his motion based on "the method by which this particular panel was selected on the first Tuesday of October"; the motion was denied (R. 64–65).

After the verdict of guilty was returned, petitioner moved in arrest of judgment on the ground, *inter alia*, that the panel from which the jury was chosen "did not contain a truly representative group of a cross section of the inhabitants of the District of Columbia, economically, socially, religiously, and politically, educationally and racially," and that "Government employees represented a disproportionately larger number of prospective jurors, than if this particular panel had been drawn and selected in compliance with the law" (R. 91–92). This motion was also denied, as was a motion for a new trial (R. 92). Petitioner was sentenced to imprisonment for a period of twenty months to five years and to pay a fine of $2,000 (R. 92–93).

On appeal, petitioner not only objected to the jury because persons not desiring to serve were

allowed to stand aside, but also urged as a ground for reversal the fact that Root, husband of a Treasury Department employee, and Moore, who he alleged was a messenger in the office of the Secretary of the Treasury, were members of the jury.[4]

The court below affirmed the conviction (R. 99–101).

SUMMARY OF ARGUMENT

1. The challenge to the array was not timely because it was not made until the time of trial, and then was delayed until after individual jurors had been challenged.

Furthermore, petitioner wholly failed to meet his burden of offering evidence in support of his challenge to the panel, and the facts alleged were at no time admitted by either the prosecution or the court.

Permitting prospective jurors who wished to be excused to stand aside while the remainder were examined would be justified as a reasonable administrative procedure for expediting the work of the court. Petitioner has not shown that the procedure allegedly adopted resulted in a jury panel any less representative of the community than would have resulted if the alleged procedure had not been followed. It has long been held that the excuse of jurors without sufficient

[4] Petitioner has abandoned his objections to the conviction on the merits.

cause does not constitute error where it is not shown that the exclusion resulted in the presence of any unqualified jurors or that the jury as finally constituted was improper as a result of the unauthorized excuse.

A jury consisting of twelve government employees is not *per se* invalid. Petitioner has not shown that the exclusively federal employee composition of the jury which tried his case was caused by the procedure allegedly followed here. The record at least indicates the possibility that petitioner's counsel exercised his ten peremptory challenges, not for the purpose of ridding the jury of an excess of government employees, but rather for the opposite purpose of overweighting it with such persons. No prejudice to petitioner has been shown, and there is no reason for this Court's exercising its supervisory jurisdiction over lower federal courts.

There is not even an allegation of "systematic and intentional" exclusion of any classes or groups of persons from the jury panel. A strong showing of such purposeful and systematic exclusion is required to sustain an attack on a jury panel as not representing a proper cross-section of the community. In any event, government employees as such do not constitute an economic or social class, but rather include persons from practically all social, economic, religious, educational and racial groups within the community.

2. By failing to challenge jurors Moore and

Root because they were an employee and the husband of an employee, respectively, in the Office of the Secretary of the Treasury, petitioner waived any objection to them. The doctrine of waiver applies both as to Root, whose alleged ground of disqualification was learned on voir dire examination, and as to Moore, who was not questioned as to his employment. This rule is established at common law, and is specifically provided by statute in the District of Columbia.

Employment in or relationship to one employed in the Office of the Secretary of the Treasury would not automatically constitute a ground of disqualification for service on a jury in a narcotic violation case. The Secretary of the Treasury's functions with respect to narcotic laws have lawfully been delegated to the Bureau of Narcotics, which is a statutorily created, semi-autonomous bureau within the Department.

In order to object to Root and Moore, petitioner would have to show actual bias. He has not alleged actual bias, nor did he examine them as to actual bias. On the contrary, both stated on voir dire examination that they knew of no reason why they could not render a fair and impartial verdict, and denied having any prejudice against persons charged with violating the narcotic laws.

ARGUMENT

I

PETITIONER'S CHALLENGE OF THE PANEL WAS PROPERLY REJECTED

A. The motion to quash the panel was not timely

The selection of the jury was commenced the morning of October 9, 1946. After petitioner's counsel had exercised eight peremptory challenges, the Government had used one (R. 6), one prospective juror had been excused by the court *sua sponte* (R. 2–3), and one had been discharged for cause on the suggestion of petitioner's counsel (R. 5), there were no more jurors immediately available, so the case was recessed until 2:30 p. m., when it was expected that more jurors would be present (R. 8). It was not until after the recess (R. 8) that petitioner first questioned the composition of the array.

As ground for the challenge, petitioner alleged facts occurring the first Tuesday of the month, eight days before this case was called for trial (R. 8). As suggested by the trial court, the challenge may well have been late because not made until the time of trial (R. 9). Cf. *United States* v. *Brookman*, 1 F. 2d 528, 537 (D. Minn.), affirmed, 8 F. 2d 803 (C. C. A. 8).

In any event, it was untimely because made after there had been challenges of individual members. A challenge to the panel or array is

an attack on the method of drawing or the composition of the entire panel, without reference to the possible disqualification of individual members. As such, it is preliminary to challenges of individuals and must be made before any individuals are challenged. In *United States* v. *Loughery*, 13 Blatch. C. C. 267, 270 (E. D. N. Y.), the defendant challenged individual talesmen on the ground that in obtaining talesmen the court officer had brought in persons who had not been present in the courtroom. It was held that the persons brought in did qualify as talesmen, the court adding:

> It would seem further that this objection was taken too late. The fact relied on, if of any effect, constituted a ground of challenge to the array, and the point should be raised by challenging the array before any of the tales were drawn. (*Bac. Abr., Juries, vol. 5, pp. 345, 352*). Here, the point was first taken as a ground of principal challenge to the polls. After a challenge to the polls if was too late to challenge the array.

Section 269 of the official draft of the American Law Institute's *Code of Criminal Procedure* (p. 108) provides:

> Challenges to the panel shall be made and decided before any individual juror is examined.

This is in accord with the practice in those states where the order of challenges is prescribed by

statute. *Ibid.*, pp. 817–818. See, also, Thompson and Merriam *On Juries*, §§ 266, 275 (1), pp. 284, 302–303; Co. Litt. 158a; Joy, *On the Admissibility of Confessions and Challenge of Jurors in Criminal Cases in England and Ireland* (Am. ed.), p. 106.

Petitioner has advanced no excuse for the tardiness of his challenge to the array. The delay is rendered particularly inexcusable by the implied allegation that the procedure objected to was customary in the court (R. 12). There is no apparent reason why petitioner's counsel could not have made his "little investigation" (R. 8) earlier and have been prepared at the proper time to present his motion to quash the panel and substantiate his objections. We submit, therefore, that there is no basis for deviating from the accepted rule that a challenge to the array must be made at the earliest possible moment and is waived by delay, particularly by proceeding to challenge individual members of the panel.

B. Petitioner did not meet his burden of sustaining the challenge to the array

In first moving to quash the panel, petitioner's counsel stated that he had "made a little investigation of the impaneling or selection of this panel here as well as the selection of the other panels sitting this month" and "from the inquiries I have made" (R. 8), he alleged that those prospective jurors who did not desire to serve were

permitted to step aside. Three times subsequently he reasserted his objection to the panel (R. 13, 64, 91–92), but on no occasion did he offer evidence to prove his unsworn, manifestly hearsay allegation.

It has uniformly been held that a challenge to a jury panel must be rejected unless it is supported by evidence. In *Glasser* v. *United States*, 315 U. S. 60, the petitioners objected to the alleged exclusion from the jury panel of all women except members of a particular private organization. This Court held that, although the facts alleged, if proved, would have required the granting of a new trial, the petitioner's failure to present proof of the allegations was fatal to their motion. The Court said (at p. 87):

> * * * from the record before us we must conclude that petitioners' showing is insufficient. The Government did not controvert the affidavits by counter-affidavits or former denial, and it does not appear from the record that any argument was heard on them. From this, petitioners argue that the allegations of the affidavits are to be taken as true for the purpose of the motion. However, this is not a case where the prosecution has impliedly, *Neal* v. *Delaware*, 103 U. S. 370, or actually, *Hale* v. *Kentucky*, 303 U. S. 613, stipulated that affidavits in support of a motion alleging the improper constitution of a jury may be accepted as proof. In the absence

of such a stipulation, it is incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion; the formal affidavit alone, even though uncontroverted, is not enough. *Smith* v. *Mississippi*, 162 U. S. 592; *Tarrance* v. *Florida*, 188 U. S. 519; cf. *Brownfield* v. *South Carolina*, 189 U. S. 426. Glasser in his affidavit, offered to prove the allegations contained therein, but the record is barren of any actual tender of proof on his part. Furthermore, there is no indication that the court refused to entertain such an offer, if it were in fact made. Roth did not even make an offer of proof in his affidavit, and Kretske did not file one. While it is error to refuse to hear evidence offered in support of allegations that a jury was improperly constituted, *Carter* v. *Texas*, 177 U. S. 442, there is, and, on the state of this record, can be, no assertion that such error was here committed. The failure of petitioners to prove their contention is fatal.

See also, *Martin* v. *Texas*, 200 U. S. 316; *Quinones* v. *United States*, 161 F. 2d 79, 81 (C. C. A. 1), certiorari denied, 331 U. S. 833; *Mamaux* v. *United States*, 264 Fed. 816, 819 (C. C. A. 6); *Hollingsworth* v. *Duane*, Wall. C. C. 147, 171 (E. D. Pa.) (digest report in 4 Dall. 353). Cf., also, *Kempe* v. *United States*, 160 F. 2d 406, 409 (C. C. A. 8), certiorari denied, 331 U. S. 843; *Wilkes* v. *United States*, 291 Fed. 988, 990 (C. C. A. 6); *United States* v. *662.44 Acres of*

Land, More or Less, 45 F. Supp. 895, 897 (E. D., Ill.), involving objections to individual jurors.

There is nothing in the present record from which an admission or concession of the facts alleged could conceivably be inferred. In first moving to quash the panel, petitioner's counsel contended that permitting some of the jurors to step aside invalidated the panel, citing *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217 (R. 8–9). The court denied the motion because of the absence of any allegation that there had been any systematic or intentional exclusion of any classes of the community from the panel, and indicated that in any event the motion was probably too late (R. 9). After the jury was finally selected, petitioner renewed his objection (R. 12), which the court immediately denied, with leave to renew it after verdict (R. 13). At the end of the testimony, he again renewed his objection (R. 64), which the court summarily rejected (R. 65). On October 23, 1946, the contention was reasserted in a written motion in arrest of judgment (R. 91–92). This motion was unsworn, was not accompanied by an affidavit, and contained no offer of proof. The Government's failure specifically to deny facts so alleged, even when reduced to writing in the form of a motion, does not constitute an admission thereof. *Brownfield* v. *South Carolina*, 189 U. S. 426, 428. There was no occasion for the prosecution either to admit or to deny

the allegations, since the court disposed of the motions summarily, on the ground, in effect, that the facts alleged, even if proved, were insufficient to require quashing the panel, since no systematic exclusion of classes of prospective jurors was alleged.

Nor would the record support any inference of a judicial admission of the facts alleged. The claimed irregularity occurred in the general selection of jury panels for all divisions of the district court.[5] Petitioner does not claim that the judge in this case knew of the adoption of the alleged procedure by the clerk (R. 12). Moreover, even if he did have personal knowledge, his silence could not be construed as a judicial admission. In *Wolf* v. *United States*, 292 Fed. 673, 678 (C. C. A. 6), defendant objected to the jury panel because it consisted of persons who had been present at a prior trial in a related case, when the judge had dismissed one juror because he alone had held out for a verdict of acquittal. In upholding the judge's denial of the challenge of the panel, the circuit court of appeals said:

> Upon the challenges to the array and the panel no proof of the matters contained therein was made or offered, and a majority of the court is of opinion that a challenge of this nature falls within the general rule recognized in *Mamaux* v. *United*

[5] Grand juries and petit juries for all divisions of the District Court are drawn from the same lists. Section 11-1407 of the District of Columbia Code, 1940.

> *States* (C. C. A. 6) 264 Fed. 816, 818 et seq., and *Smith* v. *Mississippi*, 162 U. S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082; *Martin* v. *Texas*, 200 U. S. 316, 26 Sup. Ct. 338, 50 L. Ed. 497, as to requirement of proof or offer of proof of fact in support of the challenge. Nor do we find in the record or in briefs of counsel an admission by either court or counsel of the truth of the statements as to the Mahanmah incident, although we find no denial thereof. True, the truth or falsity of the asserted facts was within the knowledge of the trial judge; but, in the opinion of a majority of this court, his failure to assert their falsity cannot be accepted as a judicial admission of their truth.

To the same effect is the related case of *Hindman* v. *United States*, 292 Fed. 679 (C. C. A. 6).[6]

C. The facts alleged, even if proved, would not require quashing the panel

Petitioner has not provided any factual details concerning the procedure allegedly followed in

[6] In these cases the facts alleged, if true, resulted in there being disqualified persons on the jury. The alleged facts would have created a "natural presumption of prejudice." *Boyles* v. *United States*, 295 Fed. 126, 127 (C. C. A. 6). In the interest of justice, because of the special circumstances presented, the circuit court of appeals in the *Wolf* and *Hindman* cases, while affirming the convictions, directed the district court to entertain new motions for a new trial, on which defendants would have an opportunity to prove the facts alleged. In the instant case, there are no such special circumstances dictating the exercise of the court's discretionary power to afford petitioner a second opportunity to rectify his initial deficiency.

the drawing of the jury panel. At one point counsel stated simply that the clerk of court permitted any prospective juror who did not care to serve to step aside (R. 12). It is not disclosed whether this action was taken in the presence of or under the direction of a judge of the court; nor does it appear whether the prospective jurors were given any instructions or advice concerning the permissible grounds for excuse. It is not alleged that any jurors were excused, but simply that some were permitted to stand by. At most, all that is alleged is that the order of calling jurors was changed. Cf. *Taylor* v. *United States*, 80 F. 2d 604, 606 (C. C. A. 5), certiorari denied, 297 U. S. 708. Perhaps what happened was that, for the purpose of expediting the business of the court, to prevent the court's having to wait until all requests to be excused were passed on before proceeding with the drawing of panels, the court made those persons who believed they were eligible to be excused wait until the rest were examined before passing on their requests for excuse. This, we submit, is a reasonable administrative procedure for expediting the court's business. As this Court said in *Fay* v. *New York*, 332 U. S. 261, 271:

> In a metropolis with notoriously congested court calendars we cannot find it constitutionally forbidden to set up administrative procedures in advance of trial to eliminate from the panel those who, in a

> large proportion of cases, would be rejected by the court after its time had been taken in examination to ascertain the disqualifications.

It cannot be said on the present record that petitioner was denied the presence of any jurors who were not eligible for excuse under Section 11–1419 of the District of Columbia Code, 1940, which provides broadly:

> A person may be excused by the court from serving on a jury when for any reason his interest or those of the public may be materially injured by his attendance * * * * or where his own health or the death or sickness of a member of his family requires his absence.[7]

Petitioner has not stated how many, if any, persons actually stepped aside when permitted to do so. Thus, it cannot be said that he was deprived of the presence of any eligible prospective jurors.[8]

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[7] Cf. *Thiel* v. *Southern Pacific Co.*, *supra*, 328 U. S. at 224: "It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship."

[8] In *Romney* v. *United States*, 167 F. 2d 521 (App. D. C.), certiorari denied, 334 U. S. 847, the defendant objected to the method of impaneling the grand jury in the District of Columbia in January 1947. The record in that case (O. T. 1947, No. 753, pp. 406–407) shows that Chief Judge Laws presided at the drawing of the jury panels, and specifically instructed prospective jurors not to request to be excused without "a very pressing reason."

In his motion in arrest of judgment, petitioner said (R. 91-92):

> That at the time of the selection of the jury panel for this court, Government employees represented a disproportionately larger number of prospective jurors, than if this particular panel had been drawn and selected in compliance with the law in selecting jurors for the various panels of the Courts.

Petitioner made no attempt, however, to show the occupations of those persons, if any, who stepped aside. Further, he has not stated that those persons, if any, who initially stood aside were ultimately excused because not needed. For all the present record shows, it is possible that the number of persons willing to serve was not sufficient to meet the needs of the courts, and that those who stood aside were subsequently examined as to their excuses and those found ineligible for excuse were assigned to specific courts, including the division in which petitioner was tried.

Petitioner has not shown the composition of the panel from which the jury was selected in this case. The record makes its clear, however, that it did contain persons who were not employed in the Government. In denying the motion to quash the panel, the trial judge said (R. 13):

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> Chance has resulted in this jury panel of twelve being composed of Government employees, but the jury list from which they by chance were selected is a mixture of Government employees and private employees.

The judge may well have been unduly magnanimous in stating that "chance" accounted for the fact that the jury finally selected consisted exclusively of government employees. At the very outset of the impaneling, before exercising any challenges, petitioner's counsel asked the prospective jurors to indicate whether they were employed by the government (R. 3). He made no objection to the panel at that time. Of the twelve in the box at that time, petitioner peremptorily challenged seven (R. 3, 4, 4, 5, 6, 7, 7,). It is possible that none of these seven was employed in the government.[9] Of the replacements, two were asked their occupations. When Clar-

[9] The fact is that none of these seven was employed in the government. It is the general practice in the criminal divisions of the District Court for the District of Columbia to have prepared lists of jury panels, showing the name, age, address and occupation of each member. Such lists are available to counsel before trial on request. The list in the present case shows the following occupations of the seven persons peremptorily challenged by petitioner from the original twelve in the box; William T. Mack, mechanic; Mrs. Marjorie E. Merrick, housewife; George M. Montgomery, mechanic; Mrs. Catherine N. Moody, housewife; William O. Parker, public radio service; Walter A. Robinson, General Electric Service Department; Joseph Rode, gas station owner. A copy of the jury panel list for this case is reprinted as Appendix A to this brief, *infra*, pp. 44.

ence A. Vogle stated that he was a "linoleum salesman for asphalt tiling," he was asked no further questions, but was peremptorily challenged by petitioner (R. 6). Similarly, petitioner peremptorily challenged James A. Longmore after he disclosed that he was a street car operator (R. 11). It should be recalled that petitioner's counsel did not object to the number or proportion of government employees on the jury panel when he first had them identified, but waited until after he had exercised all his ten peremptory challenges. It is not beyond the realm of possibility that counsel exercised his peremptory challenges, not for the purpose of excluding government employees, whom he professes to find objectionable, but rather for the purpose of excluding as many non-government employees as possible, thus overweighing the jury with federal workers, so as to lay the foundation for the contention now made.[10] The existence of this possibility most dramatically demonstrates the practical considerations underlying the strict rule that in challenging a jury panel one must fully prove his allegations.

Petitioner has not shown that as a result of the procedure allegedly followed he was tried by a jury which was improperly constituted or which contained any disqualified persons. The most he

[10] As we have seen, this is more than a mere theoretical possibility. Nine of the ten persons peremptorily challenged by petitioner were not government employees.

can be said to have claimed is that possibly some qualified persons summoned for jury service were not made available to him. It has long been established, however, that—

> The right to challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained. [*Hayes* v. *Missouri*, 120 U. S. 68, 71.]

See, also, *Spies* v. *Illinois*, 123 U. S. 131, 168; *Hopt* v. *Utah*, 120 U. S. 430, 436; *Northern Pac. R. R. Co.* v. *Herbert*, 116 U. S. 642, 646; *Smith* v. *United States*, 112 F. 2d 217, 218–219 (App. D. C.), certiorari denied, 311 U. S. 663; 1 Thompson, *Trials* (2d ed.) § 120.

It has been uniformly held in the federal courts that one cannot object to the exclusion or absence of prospective jurors without sufficient cause, unless he affirmatively shows that he has been prejudiced thereby. *United States* v. *Chapman*, 158 F. 2d 417, 419 (C. C. A. 10); *Shettel* v. *United States*, 113 F. 2d 34–36 (App. D. C.); *Kloss* v. *United States*, 77 F. 2d 462, 463 (C. C. A. 8); *Simpson* v. *United States*, 184 Fed. 817, 819 (C. C. A. 8); *Marande* v. *Texas & P. Ry. Co.*, 124 Fed. 42, 44–45 (C. C. A. 2), appeal dismissed, 197 U. S. 626; *Southern Pac. Co.* v. *Rauh*, 49 Fed. 696, 702 (C. C. A. 9); *United States* v. *Byrne*, 7 Fed. 455, 458–459; (S. D. N. Y.); *United States* v. *Cornell*, 25 Fed. Cas. 650, 656, No.

14,868 (C. C. D. R. I.). Similarly it has been held that an attack on the panel or array cannot be sustained in the absence of a showing of prejudice resulting from the claimed irregularity in drawing the panel or array, for either the grand or petit jury. *Hyde* v. *United States*, 225 U. S. 347, 374; *Rawlins* v. *Georgia*, 201 U. S. 638, 640; *Agnew* v. *United States*, 165 U. S. 36, 44; *Northern Pac. R. R. Co.* v. *Herbert*, *supra*; *Medley* v. *United States*, 155 F. 2d 857, 859 (App. D. C.), certiorari denied, 328 U. S. 873; *United States* v. *Parker*, 103 F. 2d 857, 859, 862 (C. C. A. 3), certiorari denied, 307 U. S. 642; *Morrison* v. *United States*, 71 F. 2d 358, 359 (C. C. A. 5), certiorari denied, 293 U. S. 589; *Brookman* v. *United States*, 8 F. 2d 803, 806–807 (C. C. A. 8), affirming, 1 F. 2d 534 (D. Minn.); *Moffatt* v. *United States*, 232 Fed. 522, 528 (C. C. A. 8).

Thiel v. *Southern Pacific Co.*, 328 U. S. 217, and *Ballard* v. *United States*, 329 U. S. 187, 195 (followed in *Zap* v. *United States*, 330 U. S. 800), impose some restriction on the previously long standing, undeviating requirement that a challenge to the composition of a jury panel must in every case be supported by a clear showing of prejudice to the party objecting. In those cases, this Court, in the exercise of its supervisory jurisdiction over lower federal courts, sustained attacks against the composition of jury panels without any specific showing of prejudice to the

defendant. The procedures objected to there, however, were of a substantial nature, involving systematic exclusion of classes from the jury panel. Purposeful courses of conduct had been adopted, which, if continued, by their nature would have tended to affect the rights of parties. In the present case there is no such situation calling for the exercise of the Court's supervisory jurisdiction.

As is clearly shown by the later case of *Fay v. New York, supra,* prejudice must be shown to support a constitutional objection to the composition of a jury panel on any ground other than racial discrimination. In that case the Court said (332 U. S. at 292–294):

> Nor is there any such persuasive reason for dealing with purposeful occupational or economic discriminations if they do exist as presumptive constitutional violations, as would be the case with regard to purposeful discriminations because of race or color. We do not need to find prejudice in these latter exclusions, but cf. *Strauder v. West Virginia*, 100 U. S. 303, 306–309, for Congress has forbidden them, and a tribunal set up in defiance of its command is an unlawful one whether we think it unfair or not. But as to other exclusions, we must find them such as to deny a fair trial before they can be labeled as unconstitutional.
>
> * * * The defendants have shown no intentional and purposeful exclusion of

> any class, and they have shown none that was prejudicial to them. They have had a fair trial, and no reason appears why they should escape its results.

Petitioner has advanced no basis for a claim of prejudice.[11] As shown above, he has totally failed to support even the contention that the procedure objected to resulted in, or would normally tend to result in (cf. *United States* v. *Local 36 of International Fishermen*, 70 F. Supp. 782, 799 (S. D. Cal.)), the disproportionate weighting of the jury with government employees. The absence of evidence concerning the persons, if any, who stepped aside and the actual composition of the panel in this case is fatal to any possible claim of prejudice. And the lack of any showing of prejudice is, in turn, fatal to petitioner's constitutional objection to the procedure allegedly followed.

At one point (R. 13) petitioner frankly relied upon the broad contention that any irregularity in the impaneling of a jury amounts to prejudice as a matter of law. We submit, however, that this contention is not supported by the cases, but, on the contrary, the cases above cited establish the exact opposite. Even the *Thiel* and *Ballard* cases assume that an irregularity in impaneling a jury does not necessarily cause prejudice; they merely hold that under certain circumstances it is not necessary to show prejudice.

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[11] The procedure allegedly followed here is in no manner causally related to the presence of the two individual jurors to whom petitioner specifically objects. Their qualification is discussed in Point II, *infra*.

Perhaps more fundamental than petitioner's failure to show prejudice is the absence of any allegation of a systematic, purposeful or intentional exclusion of any classes from the jury. As said in the *Fay* case, *supra* (332 U. S. at 284–285):

> It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years. *Virginia* v. *Rives*, 100 U. S. 313, 322–23; *Martin* v. *Texas*, 200 U. S. 316, 320–21; *Thomas* v. *Texas*, 212 U. S. 278, 282; *Smith* v. *Texas*, 311 U. S. 128; *Hill* v. *Texas*, 316 U. S. 400; *Akins* v. *Texas*, *supra*. Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant. *Tarrance* v. *Florida*, 188 U. S. 519; *Martin* v. *Texas*, 200 U. S. 316; *Norris* v. *Alabama*, 294 U. S. 587; *Snowden* v. *Hughes*, 321 U. S. 1, 8–9; *Akins* v. *Texas*, 325 U. S. 398, 400.

Cf. *Moore* v. *New York*, 333 U. S. 565; *Quinones* v. *United States*, 161 F. 2d 79, 81; *Wong Yim* v. *United States*, 118 F. 2d 667, 668 (C. C. A. 9), certiorari denied, 313 U. S. 589; *Mamaux* v. *United States*, 264 Fed. 816; *United States* v. *Local 36 of International Fishermen*, 70 F. Supp. at p. 790.

Even in the *Thiel* and *Ballard* cases, where ob-

jections to jury panels were upheld without any showing of actual injury, the requirement of a showing of purposeful and systematic exclusion was maintained. The *Thiel* case merely held that (328 U. S. at 220):

> * * * prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these [economic, social, religious, racial, political, and geographical] groups. . . .

The *Ballard* case condemned only "the purposeful and systematic exclusion of women from the panel" (329 U. S. at 193). In the present case there is no contention of exclusion of any classes from jury service. Certainly there is no allegation of any systematic action by the court calculated to exclude any classes of the community. Whatever irregularity there may have been was entirely unsystematic.

The instant case presents at most a minor irregularity and no substantial error. It in no way tends to undermine "civilized standards of procedure and evidence." Cf. *McNabb* v. *United States*, 318 U. S. 332, 340. It would not tend to "undermine and weaken the institution of jury trial," *Thiel* v. *Southern Pacific Co.*, *supra*, at p. 224; nor would it amount to an "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, *supra*, at p. 195. We submit,

accordingly, that if any error was committed in this case, it was purely harmless error, and the conviction should stand. Rule 52 of the Federal Rules of Criminal Procedure; cf. 18 U. S. C. 556.[12]

D. That the jury consisted exclusively of government employees does not warrant quashing the panel

Government employment does not disqualify one for jury service. District of Columbia Code, 1940, § 11–1420; *United States* v. *Wood*, 299 U. S. 123; *Higgins* v. *United States*, 160 F. 2d 222 (App. D. C.), certiorari denied, 331 U. S. 822; *Kempe* v. *United States*, 160 F. 2d 406, 409 (C. C. A. 8), certiorari denied, 331 U. S. 843; *Great Atl. & Pac. Tea Co.* v. *District of Columbia*, 89 F. 2d 502 (App. D. C.), certiorari denied, 301 U. S. 691. Nor can it be argued that a jury composed exclusively of government employees is objectionable *per se*. *Schackow* v. *Government of the Canal Zone*, 108 F. 2d 625 (C. C. A. 5). That specific classes were not represented on the jury (*Ruthenberg* v. *United States*, 245 U. S. 480, 481–482) or that the jury consisted of but one group does not establish that a defendant has been denied a fair trial by an impartial jury. *Thomas* v. *Texas*, 212

[12] In *Fay* v. *New York*, *supra*, it was complained that prospective jurors were asked to specify the months in which they would prefer to serve, with the many who stated a preference being excluded from the special panel. These admitted circumstances were regarded by this Court as only "an administrative ineptitude of no constitutional significance and of no prejudice to these defendants" (332 U. S. at p. 278).

U. S. 278, 282; *Martin* v. *Texas*, 200 U. S. 316, 320–321; *United States* v. *Brady*, 133 F. 2d 476, 480 (C. C. A. 4), certiorari denied, 319 U. S. 746, rehearing denied, 319 U. S. 784.

In *Higgins* v. *United States*, 160 F. 2d 222 (App. D. C.), which, like the present, involved a narcotic law violation, nine of the twelve jurors were government employees. The court rejected the defendant's attack on the jury as not being a representative cross-section of the community, saying (at p. 223):

> * * * we think the motion, whenever made unsustainable for the reason that its only basis is that the jury included nine Government employees, none of whom was employed in the particular branch of the Government charged with the administration of the narcotic laws;[13] and each of whom, when asked on his examination if his employment would in any way influence his judgment, replied in the negative. Unless therefore a disqualification inhered in the fact of the employment relationship, the point is without merit. And that such a relationship is not a bar was clearly decided by the Supreme Court over ten years ago. Moreover, the doctrine of fair cross-section applies to the names placed in the box from which potential jurors are drawn, not to each twelve who happen, after challenges, to remain on a jury.

[13] The presence of a Treasury Department employee and the husband of such an employee on the jury in the instant case is discussed in Point II, *infra*.

> Here, presumably, such names as were placed in the box embraced all classes and all sections. That many are government employees is a necessary incident of the greater preponderance of government employment over private employment in the District of Columbia. Even in this respect, it cannot be properly contended that the resulting conditions fail to measure up to what is termed a fair cross-section.

The mere fact of government employment has no tendency whatsoever to indicate prejudice against a criminal defendant. As this Court said in *United States* v. *Wood*, *supra*, 299 U. S. at 149:

> Why should it be assumed that a juror, merely because of employment by the Government, would be biased against the accused? In criminal prosecutions the Government is acting simply as the instrument of the public in enforcing penal laws for the protection of society. In that enforcement all citizens are interested. It is difficult to see why a governmental employee, merely by virtue of his employment, is interested in that enforcement either more or less than any good citizen is or should be. * * *

The record does not disclose the government agency in which each of the jurors worked nor the capacity in which he was employed.[11] Govern-

[11] The jury panel list reproduced as Appendix A, *infra*, pp. 44, shows the following employment among the jurors in this case: Benjamin Root, War Department, supervisor; Charlotte E. Jones, War Department, typist; James J.

ment employment runs practically the complete gamut of occupations. Wages and salaries and the methods of payment vary greatly within the federal service. As of October 1946, when this case was tried, annual salaries within the classified civil service ranged from $1,080 to $10,000 (42 Stat. 1491, as amended by 60 Stat. 216, 219, 5 U. S. C. 673). In 1947 hourly rates of pay for employees whose compensation was fixed by wage boards ranged from 70 cents to $1.59, and a similarly wide range was shown in daily wage rates and in the compensation of postal employees. *Pay Structure of the Federal Civil Service, 1947* (U. S. Civil Service Commission, Pamphlet 33, March 1948). Because of the broad scope of governmental activities and the practically unlimited variety of occupations within the government service, it can hardly be said that government employees in any true sense constitute a class. That their compensation comes from the United

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Lawlor, Federal Public Housing Agency, engineer; John C. Lazarus, Reconstruction Finance Corporation, accountant; Mary B. Staves, War Department, clerk; Herbert F. Stames, Post Office, carrier; Alexander Moore, Treasury Department, messenger. Margaret T. Lorenz, Floyd F. Grayson, William E. Brown, Jason E. Barr and Paul D. N. Leman are not listed. Apparently they were "borrowed" from the civil jury panel, since the record shows that some persons from the civil panel were used in this case (R. 12). We have, however, secured a copy of the final list of jurors in this case, which we are reprinting as Appendix B hereto, *infra*, pp. 45. It shows that James E. Barr was a division chief, Department of Agriculture; William E. Brown, clerk, Post Office Department; Floyd F. Grayson, mail carrier; Margaret T. Lorenz, clerk, Army Air Forces.

States is scarcely enough to provide such homogeneity among otherwise diverse persons as to create a social or economic class distinct from other wage earners and salaried workers. Thus, even if petitioner had supported his contention that the procedure allegedly adopted in this case resulted in there being a disproportionate number of government employees on the jury panel, he would not have demonstrated that any social or economic class was over-represented.

On the prosecution's examination, each juror stated that he knew of no reason why he could not render an impartial verdict (R. 3, 4, 5, 6, 7, 10, 11, 12). Petitioner had full opportunity to examine the prospective jurors concerning actual prejudice or bias and he availed himself of this opportunity to the extent that he saw fit. We believe it would do violence to the basic principles of jury trial to hold that petitioner was denied trial by an impartial jury on the bare showing that after he had exercised ten peremptory challenges he was tried by a jury composed of twelve government employees. And this is the only fact alleged which is actually shown on the record.

II

PETITIONER'S OBJECTION TO TWO MEMBERS OF THE JURY WAS WAIVED BY FAILURE TO CHALLENGE, AND, IN ANY EVENT, IS WITHOUT MERIT

Petitioner contends that his conviction cannot stand because the jury which convicted him con-

tained an employee of the Treasury Department and the husband of such an employee.

The fact that juror Root's wife was employed, in an undesignated capacity, in the Office of the Secretary of the Treasury was elicited by counsel on voir dire examination at a time when he had remaining six peremptory challenges (R. 5). Yet he did not challenge Root either for cause or peremptorily.

Juror Moore, who is alleged to have been a messenger in the Office of the Secretary of the Treasury (Pet. 10), was one of the first twelve jurors presented (R. 1). He answered a series of questions to the effect that he was a government employee (R. 3); that he was not related to any member of the Metropolitan Police, the Federal Bureau of Investigation or any narcotic enforcement officer (R. 3); that no member of his immediate family was employed in the Treasury Department (R. 5); that he had no prejudice against anyone charged with violation of the narcotic laws (R. 3); and that he knew of no reason why he could not render a fair and impartial verdict (R. 3). Although petitioner had full opportunity to examine prospective jurors, he did not see fit to inquire whether any of them was employed in the Treasury Department, and

Moore's employment was not brought out at the trial."[15]

Although the record shows that neither Root nor Moore was individually challenged, petitioner apparently claims the right at this time to urge their disqualification as a ground for setting aside the verdict because he challenged the array for cause (Pet. 6). A challenge to the panel or array is based upon an irregularity in the drawing or composition of the panel, which affects the entire panel in common. Such a challenge is not the proper method of raising an objection to a particular juror. *United States* v. *662.44 Acres of Land, More or Less*, 45 F. Supp. 895, 897; Joy, *op. cit.*, p. 103. Petitioner never advanced Moore's employment by the Treasury Department or Root's relationship to a Treasury Department employee as a ground for challenge. He cannot now avail himself of grounds not stated at the time of challenge. *Southern Pac. Co.* v. *Rauh*,

[15] Apparently this fact was learned after trial, while the case was pending on appeal. Moore's occupation, however, was shown on the jury list referred to in note 7, *supra*.

Petitioner states (Pet. 11) that Moore's employment in the Treasury Department was admitted by the prosecution in its "Answer to Supplemental Memorandum in Support of Application for Reconsideration of Motion for Bail Pending Appeal." That document, filed in the Court of Appeals on December 18, 1946, says: "The Court records show that, while each of the twelve jurors was a government employee, only one was an employee of the Treasury Department, and he a messenger in the Office of the Secretary of the Treasury." Petitioner had stated that two of the jurors were Treasury employees.

supra; Co. Litt. 158a; *Luke* v. *Clerk,* (1615) Moore, K. B., 846. If a blanket challenge to the entire panel were sufficient to constitute a challenge of each member thereof, without any statement of specific grounds applicable to each, it is doubtful whether any convictions could ever stand. As was said in *Hollingsworth* v. *Duane,* Wall. C. C. 147, 152:

> The causes of challenge are infinite; and perhaps not one jury in ten are sworn, that if the situations, connections, interests and qualifications of each juror was critically inquired into after verdict, some one or more would not be found, in some capacity, to be subject of challenge.

The common law rule that challenges must be taken before the jurors are sworn (5 Bac. Abr., Juries E, 11; Co. Litt. 158a; 1 Chitty, *Criminal Law,* *533; *Green* v. *Dennis,* Cro. Eliz., 845) has been consistently followed in the federal courts. *Queen* v. *Hepburn,* 7 Cranch 290; *United States* v. *Gale,* 109 U. S. 65, 72; *Kohl* v. *Lehlback,* 160 U. S. 293; *Strang* v. *United States,* 53 F. 2d 820 (C. C. A. 5); *Strang* v. *United States,* 45 F. 2d 1006 (C. C. A. 5). Failure to challenge a juror amounts to a waiver of any objection to him (*Queenan* v. *Oklahoma,* 190 U. S. 548), and an objection cannot be raised for the first time after verdict, even where the ground for challenge was not known when the jury was being impaneled (*Kohl* v. *Lehlback, supra; Hollingsworth* v.

Duane, supra; Raub v. *Carpenter,* 187 U. S. 159, 163–164; *Bush* v. *United States,* 16 F. 2d 709, 711 (C. C. A. 5); *Roush* v. *United States,* 47 F. 2d 444, 445 (C. C. A. 5); *United States* v. *Baker,* 3 Ben. D. C. 68 (S. D. N. Y.)), since there is an obligation to exercise due diligence in examining prospective jurors as to their qualifications. *Ippolito* v. *United States,* 108 F. 2d 668, 669 (C. C. A. 6); *Union Electric Light & Power Co.* v. *Snyder Estate Co.,* 65 F. 2d 297, 301 (C. C. A. 8); *Morse* v. *Montana Ore-Purchasing Co.,* 105 Fed. 337, 338 (C. C. D. Mont.); *United States* v. *662.44 Acres of Land, More or Less, supra.* See *Brewer* v. *Jacobs,* 22 Fed. 217, 241 (C. C. W. D. Tenn.), where, after an exhaustive review of the authorities, it is said:

> Nothing is better settled than that a party cannot, either with knowledge of a juror's disqualification or from supineness and culpable negligence in ascertaining whether he is qualified or not, speculate upon the result of a trial, holding in reserve whatever he may know or can afterwards ascertain to vitiate the verdict, if against him.

The applicability of the rule does not depend upon the nature of the objection raised to the particular juror. In *Kohl* v. *Lehlback, supra,* 160 U. S. at 301, the Court quoted with approval the following passage from *Wassum* v. *Feeney,* 121 Mass. 93, 94:

> When a party has had an opportunity to challenge, no disqualification of a juror entitles him to a new trial after verdict. This convenient and necessary rule has been applied by this court, not only to a juror disqualified by interest or relation, *Jeffries* v. *Randall*, 14 Mass. 205; *Woodward* v. *Dean*, 113 Mass. 297; but, even in a capital case, to a juror who was not of the county or vicinage, as required by the Constitution. * * *

In *Howard* v. *United States*, 26 F. 2d 551 (App. D. C.), a capital case, an objection to a juror because she was the wife of the deputy marshal was held too late when first raised on appeal. In *Paolucci* v. *United States*, 30 App. D. C. 217, certiorari denied, 208 U. S. 617, a first degree murder conviction, a new trial was sought on the ground that one of the jurors had expressed prejudice against all Italians and the defendant was Italian. The trial court's rejection of the challenge as untimely was upheld. The same principle was applied in *Orme* v. *Pratt*, 18 Fed. Cas. 820, No. 10,578 (C. C. D. C.), where it was alleged that one of the jurors was a brother-in-law of the plaintiff. In *Carruthers* v. *Reed*, 102 F. 2d 933, 938–939 (C. C. A. 8), certiorari denied, 307 U. S. 643, it was held that by not challenging the panel a defendant waived the right to object to the exclusion of Negroes from the jury. And in *Nelson* v. *United States*, 53 F. 2d 935 (App. D. C.), an objection to the jury

because women were permitted to sit was held too late when raised first on a motion for a new trial. Failure to challenge has also been held to constitute a waiver of an objection to jurors because of alleged employment by the Government. *Great Atl. & Pac. Tea Co. v. District of Columbia*, 89 F. 2d 502, certiorari denied, 301 U. S. 691. Cf. 1 Thompson, *Trials* (2d ed.) § 116, pp. 137–141.

Section 23–108 of the District of Columbia Code, 1940, specifically provides:

> No verdict shall be set aside for any cause which might be alleged as ground for challenge of a juror before the jury are sworn, except when the objection to the juror is that he had a bias against him, and such disqualification was not known to or suspected by the defendant or his counsel before the juror was sworn.

It has been held that this statute is merely declaratory of the common law, or, if anything, restricts, rather than extends, the discretionary power of courts to grant new trials. *Paolucci v. United States*, *supra*, 30 App. D. C. at 222. This provision clearly precludes petitioner's objection to juror Root, whose alleged disqualification was known before he was sworn. Any objection to Moore was forfeited by petitioner's failure to exercise reasonable diligence in examining him to ascertain any possible ground of disqualification.

We submit further, however, that neither Root nor Moore was subject to successful challenge for

cause. Moore and Root's wife were but two of many thousands of employees in the Treasury Department.[16] There is no suggestion that either had any relationship to the Bureau of Narcotics. Although the Secretary of the Treasury is by statute charged with enforcement of the Harrison Narcotic Acts (26 U. S. C. 2550–2564, 3220–3228), pursuant to Congressional authorization (26 U. S. C. 2606), he has delegated to the Commissioner of Narcotics "the investigation, detection and prevention of violations of the Federal narcotic and marihuana laws." 21 C. F. R., 1946 Supp., § 206.1. The Bureau of Narcotics is a statutorily created bureau within the Treasury Department (5 U. S. C. 282); it is subject only to the "general supervision and direction" of the Secretary of the Treasury (21 C. F. R., 1946 Supp., § 206.3) and its decisions are subject to review by the Secretary on formal appeal (5 U. S. C. 282c). That counsel for petitioner recognizes the separation of the functions of the various branches and bureaus within the Treasury Department is attested by the fact that after he learned that Root's wife worked in the Department, he proceeded to inquire further as to the particular part thereof she was employed in. When it was stated that she worked in the Office of the Secretary, counsel did not challenge Root.

[16] As of July 31, 1947, there were 87,362 employees in the Treasury Department. *Pay Structure of the Federal Civil Service*, *supra*, p. 20.

In *United States* v. *Wood*, *supra*, 299 U. S. at pp. 149–150, this Court expressly refrained from stating that employment in the branch of the government having jurisdiction over the subject matter of a particular case would *ipso facto* disqualify a person from serving on the jury. Specifically addressing itself to situations similar to that presented by Moore, the Court said:

> It is said that particular crimes might be of special interest to employees in certain governmental departments, as, for example, the crime of counterfeiting to employees of the treasury. But when we consider the range of offenses and the general run of criminal prosecutions, it is apparent that such cases of special interest would be exceptional. The law permits full inquiry as to actual bias in any such instances. We repeat, that we are not dealing with actual bias and, until the contrary appears, we must assume that the courts of the District, with power fully adequate to the occasion, will be most careful in those special instances, where circumstances suggest that any actual partiality may exist, to safeguard the just interests of the accused.

Moore's employment as a messenger in the Office of the Secretary of the Treasury, at the very most, suggests that "actual partiality *may* exist." Voir dire examination by petitioner's counsel could have established whether it did in fact exist or not. Petitioner cannot now complain of his failure to inquire into the facts. Cf. *Bratcher* v. *United*

States, 149 F. 2d 742, 745 (C. C. A. 4), certiorari denied, 325 U. S. 885. A *fortiori* he cannot object to Root because of the even more attenuated relationship to the prosecution, of which relationship he was aware when the jury was being impaneled.

CONCLUSION

The judgment below should be affirmed.

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Attorneys.

OCTOBER 1948.

APPENDIX A

Jurors—Criminal Division No. Two, October 1946

1.	Thomas J. Barnes (35) (Govt.)	3524 Texas Ave., S. E.	G. P. O.—Bookbinder
2.	Edgar M. Clark (41)	4628 Windom Pl. N. W.	P. E. P. Co.—Clerk
3.	Mrs. Florence Humphrey Crawford (25) (Govt.)	1731 New Hampshire Ave. N. W. #304	Identification Specialist
4.	Mrs. Alberta S. Cryer (37) (Govt.)	4449 Ala. Ave. S. E.	G. P. O.—Typist
5.	William J. Curtin (61) (Govt.)	3338 Pea St. N. W.	Navy Dept.
6.	Louis H. Fisher (59)	1128 Col. Rd. N. W.	Salesman—Funeral Supplies
7.	Miss Margaret Fleetwood Gordon (25)	2905 Woodland Dr. N. W.	Unemployed
8.	Mrs. Florence Wm. Gorman (34) (Govt.)	4512 El. Ave. N. W.	Navy Dept.—Spvsr.
9.	Robert H. Hurd (50)	5046 New Hampshire Ave. N. W. #101	Receptionist Hub Furn. Co.
10.	James W. Jolliffee (57) (Govt.)	5040 New Hampshire Ave. N. W. #202	Int. Rev.—Clerk
11.	Miss Charlotte Esther Jones (26) (Govt.)	2013 Vermont Ave. N. W.	War Dept.—Typist
12.	James J. Lawlor (58) (Govt.)	1627 35th St. N. W.	Engr.—Fed. Pub. Hous.
13.	John G. Lazarus (32) (Govt.)	3919 R St. S. E. #1	R. F. C.—Accountant
14.	William T. Mack (47)	208 E St. S. W.	Engr.
15.	Mrs. Marjorie Ekholm Merrick (36)	Roger Smith Hotel	Housewife
16.	George M. Montgomery (63)	735 New Jer. Ave. NW.	Mechanic.
17.	Mrs. Catherine N. Moody (34)	1629 L St. N. E.	Housewife
18.	Alexander Moore (55) (Govt.)	317 47th St. N. E.	Treas.—Messenger
19.	William O. Parker (22)	1424 L St. S. E. #2	Pub. Radio Serv.
20.	Walter A. Robinson (45)	2370 Champlain St. N.W. #12	Gen. Elec. Ser. Dept.
21.	Joseph Rode (49)	302 Emerson St. N. W.	Gas Sta. Owner
22.	Benjamin Root (47) (Govt.)	1314 Upsher St. N. W.	War Dept.—Spvsr.
23.	Miss Mary Beatrice Staves (31) (Govt.)	1913 11th St. N. W.	Clk.—War Dept.
24.	Grover C. Sullivan (40)	916 8th St. N. E.	Chest. Farm Dairy
25.	Herman F. Stamps (49) (Govt.)	1219 Kenyon St. N. W.	P. O. Carrier
26.	Mrs. Mary Rice Willmer (40)	729 Gallatin St. N. W.	Hecht Co., Comptometer Optr.

APPENDIX B

List of Jurors in Case of United States v. Robert Frazier, Cr. No. 73,806

1. James E. Barr	2214 Kearny St. N. E.	Division Chief, Department of Agriculture.
2. William E. Brown	720 24th Street, N. E.	Clerk, Post Office Dept.
3. Miss Charlotte Esther Jones	2013 Vermont Ave. N. W.	War Dept.—Typist
4. Floyd F. Grayson	412 23rd Pl., N. E.	Mail carrier
5. James J. Lawlor	1627 35th St. N. W.	Engr.—Fed. Pub. Housing
6. John G. Bazarus	3919 R St., S. E. #1	R. F. C.—Accountant
7. Paul D. N. Leman	4604 New Hampshire Ave., N. W.	Machinist—Navy Yard
8. Margaret T. Lorenz	1332 Pa. Ave., S. E.	Clerk—A. A. F.
9. Alexander Moore	217 47th St., N. E.	Treas.—Messenger in Office of Secretary of Treas.
10. Benjamin Root	1314 Upshur St., N. W.	War Dept.—Spver.
11. Miss Mary Beatrice Staves	1913 11th St., N. W.	Clk.—War Dept.
12. Herman F. Stamps	1219 Kenyon St., N. W.	P. O Carrier